March 1999 container importation that was the basis for the conspiracy-to-import count, and that several other "undisputed facts" corroborated the government's theory on that charge. Pet. App. 14a & n.8. Those facts included that "the container filled with cocaine was consigned to [petitioner's] company, Yalorde Tile," and "Yalorde's representative in Ecuador hired one company to load some containers and another person to load others, even though the containers were being filled with products from the same company." *Id.* at 14a. In light of the additional evidence, the court was not "'left in grave doubt' that 'the error itself had substantial influence' on the jury's verdict" on the conspiracy count. *Id.* at 15a (quoting *Stephens*, 365 F.3d at 977).[3]

Petitioner filed a rehearing petition in which he claimed that the panel erred by placing the burden on him to establish prejudice from evidentiary errors to which he objected at trial, and by failing to apply the "harmless beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U.S. 18 (1967). Pet. for Reh'g 5-15. The court of appeals denied the petition for rehearing. Pet. App. 16a-17a.

ARGUMENT

1. Petitioner argues (Pet. 9-13) that the court of appeals erred by placing the burden on him to demonstrate prejudice from the district court's evidentiary errors. Although the court of appeals incorrectly stated that petitioner was required to establish that errors to which

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[3] The court of appeals also rejected petitioner's challenges to the exclusion of Perez's recorded statements and the Ecuadorian police report, and did not reach his claim that the district court had misapplied the Sentencing Guidelines. Pet. App. 6a n.5, 15a. Petitioner does not press those claims before this Court.

he objected in the district court affected his substantial rights, further review is not warranted because the court of appeals' unpublished decision sets no precedent and it is plain that the court's misstatement had no impact on the decision.

The harmless-error rule, Federal Rule of Criminal Procedure 52(a), provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." As petitioner notes (Pet. 9), this Court has repeatedly recognized that, on direct appeal from a conviction, Rule 52(a) places the burden on the government to establish that an error to which the defendant adequately objected in the trial court did not affect the defendant's substantial rights. In *United States* v. *Olano*, 507 U.S. 725 (1993), the Court addressed the interplay between Rule 52(a) and the plain-error rule, Rule 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The Court concluded that under both Rule 52(a) and Rule 52(b), an effect on "substantial rights" means that the error "must have been prejudicial," which in turn means that it "must have affected the outcome of the district court proceedings." *Id.* at 734. The Court noted, however, "one important difference" between the harmless-error and plain-error rules: under the plain-error rule, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.* The Court explained that "[t]his burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights'" (emphasis added), Rule 52(b) authorizes no remedy unless the er-

ror *does* "affec[t] substantial rights." *Id.* at 735 (brackets in original) (quoting Rule 52).

The Court has cited *Olano* several times for the proposition that, on direct appeal from a conviction, Rule 52(a) requires the government to show the absence of prejudice with respect to errors to which the defendant adequately objected. See, *e.g.*, *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 n.8 (2004); *United States* v. *Vonn*, 535 U.S. 55, 62 (2002); *O'Neal* v. *McAninch*, 513 U.S. 432, 438 (1995); see also *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) (interpreting harmless-error statute containing language similar to Rule 52(a), and holding that the "conviction cannot stand" if an error "had substantial influence" on the verdict *or* "if one is left in grave doubt" as to whether it had such influence); *United States* v. *Lane*, 474 U.S. 438, 449 (1986) (citing *Kotteakos* as providing appropriate inquiry under Rule 52(a) for assessing harmlessness of misjoinder and quoting "grave doubt" language).

In light of the foregoing, the court of appeals was incorrect in stating that petitioner must "establish that the [district court's evidentiary] error[s] affected a substantial right." Pet. App. 8a. Rather, because the court of appeals concluded that petitioner had adequately raised the errors at trial (*id.* at 9a n.6), the government had the burden of establishing that the errors did not affect his substantial rights. Nevertheless, it is clear that the court's misstatement had no effect on the outcome of petitioner's appeal.

In *O'Neal* v. *McAninch*, *supra*, this Court discussed the common law harmless-error rule, under which the party benefitting from an error was required to demonstrate the absence of injury from the error. The Court held that in the "unusual" circumstance in which record

review leaves a court in grave doubt as to whether an error affects substantial rights, the court should grant relief. 513 U.S. at 435, 445. The Court emphasized that the question of which party bears the burden with respect to prejudice is normally not outcome-determinative in harmless-error analysis because the reviewing court will generally be able to ascertain, based on its own review of the record, whether the error substantially influenced the jury's verdict. *Id.* at 435-437. The Court explained that the burden is dispositive only in the "special circumstance" in which the court, after reviewing the record, is left with "grave doubt about the likely effect of an error on the jury's verdict"—that is, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435; see *id.* at 436-437.

The court of appeals' opinion makes clear that this case does not present such a "special circumstance." The court concluded, based on its review of the record, that the erroneous exclusion of evidence "'was more likely than not a substantial factor' in [petitioner's] conviction for possessing cocaine with the intent to distribute [it]," but that the errors did not contribute to the jury's verdict on the conspiracy-to-import count, which was supported by substantial, undisputed evidence independent of Perez's testimony. Pet. App. 14a-15a (quoting *Stephens*, 365 F.3d at 980). The court expressly noted that it was "not 'left in grave doubt' that 'the error[s] [themselves] had substantial influence' on the jury's verdict" on the conspiracy-to-import count. *Id.* at 15a (quoting *Stephens*, 365 F.3d at 977). Accordingly, the court of appeals' misstatement on the burden of persuasion had no impact on its conclusion that the error was harmless.

Petitioner is mistaken in asserting that this Court's intervention is needed because of "conflicting decisions" on the burden issue within and among the courts of appeals. Pet. 11. As petitioner appears to acknowledge, the Eleventh Circuit and "all other circuits" generally have "correctly saddled the government with the burden of persuading that a preserved trial error was harmless." Pet. 10-11 (citing cases); see *United States* v. *Magluta*, 418 F.3d 1166, 1180 (11th Cir. 2005); *United States* v. *Monroe*, 353 F.3d 1346, 1352 (11th Cir. 2003); *United States* v. *Fern*, 155 F.3d 1318 (11th Cir. 1998). Although petitioner has identified certain decisions that incorrectly state that the burden of demonstrating prejudice rests with the party asserting the error, petitioner has not demonstrated that those courts in fact intended to shift the burden rather than merely made a misstatement. The misstatements in those cases, in any event, did not affect the outcome.[1]

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[1] In a number of decisions cited by petitioner, the court of appeals misstated the burden but found no evidentiary error. See *United States* v. *Breitweiser*, 357 F.3d 1249, 1254 (11th Cir.), cert. denied, 541 U.S. 1091 (2004); *United States* v. *Izydore*, 167 F.3d 213, 218 (5th Cir. 1999) (finding no evidentiary error but stating that court had nevertheless "reviewed the record as a whole and [could not] conclude that [any error] * * * affected the substantial rights of the appellants"); *United States* v. *Saget*, 991 F.2d 702, 709-711 (11th Cir.), cert. denied, 510 U.S. 950 (1993); *United States* v. *Cameron*, 907 F.2d 1051, 1068 (11th Cir. 1990); see also *United States* v. *Dack*, 987 F.2d 1282, 1284-1285 (7th Cir. 1993) (finding no instructional error but concluding that any error was in any event harmless in light of overwhelming evidence of guilt).

In two of the cases cited by petitioner, the court of appeals incorrectly stated that the complaining party had the burden of establishing prejudice from preserved claims of evidentiary error, but correctly recognized in conducting harmless-error review that a preserved error is not harmless if the court is left in "grave doubt" about whether it affected the defendant's substantial rights. *Stephens*, 365 F.3d at 977

2. Petitioner also contends (Pet. 13-20) that the court of appeals applied the wrong harmless-error standard when it concluded that the exclusion of Bover's testimony and the 1997 Vasquez invoices and telephone records did not affect his substantial rights with respect to the conspiracy-to-import conviction. That claim does not warrant review.

In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court held that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. In contrast, under *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), a *non*-constitutional error is harmless unless it had a "substantial and

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(holding that exclusion of exculpatory evidence was prejudicial); *United States* v. *Mitchell*, 113 F.3d 1528, 1532 (10th Cir. 1997) (in light of "overwhelming" evidence of guilt, court could not "say that the error had a substantial influence in determining the jury's verdict"), cert. denied, 522 U.S. 1063 (1998).

Finally, petitioner cites several cases, like the instant case, in which a court reviewing a preserved claim of evidentiary error incorrectly stated that the complaining party had the burden of establishing prejudice and found error, but nevertheless made clear that there was no "grave doubt" concerning whether the defendant's substantial rights were affected. See *United States* v. *Burston*, 159 F.3d 1328, 1336 (11th Cir. 1998) (finding no prejudice in exclusion of impeachment evidence because the evidence supporting the conviction was "overwhelming" and because the excluded evidence would have had only a "marginal impact" in light of the other "substantial evidence calling into question" witness's credibility); *United States* v. *Messner*, 107 F.3d 1448, 1455 (10th Cir. 1997) (finding no prejudice from claimed evidentiary error where record made clear that the defendant's "substantial rights * * * could not have been affected"); *United States* v. *Montoya*, 827 F.2d 143, 154 (7th Cir. 1987) (finding no prejudice in improper admission of hearsay because district court immediately gave a curative instruction and the other evidence of guilt was "overwhelming").

injurious effect or influence in determining the jury's verdict."

Although the court of appeals did not specifically refer to *Kotteakos* or *Chapman* in its unpublished opinion, the court's harmless-error analysis and its citation of *Stephens* indicate that the court applied the *Kotteakos* standard. See Pet. App. 13a-15a (assessing whether errors had a "substantial influence on the jury"); see also *Stephens*, 365 F.3d at 977 (citing *Kotteakos*). Petitioner argues (Pet. 18) that the court of appeals should have instead applied the *Chapman* test because an erroneous ruling excluding relevant and favorable defense evidence necessarily amounts to constitutional error. In its broadest form, that contention is incorrect.

As petitioner notes (Pet. 14), the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment give a defendant a right to present witnesses or evidence in his defense. See, *e.g.*, *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973); *Washington* v. *Texas*, 388 U.S. 14, 18-19 (1967). "A defendant's right to present relevant evidence is not unlimited," however, "but rather is subject to reasonable restrictions," including restrictions embodied in the rules of evidence and procedure. *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998); *Taylor* v. *Illinois*, 484 U.S. 400, 411-416 (1988); *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987). Moreover, as the decisions cited by petitioner establish, "'[e]rroneous evidentiary rulings rarely rise to the level of harm to th[e] fundamental constitutional right' to present a meaningful defense." *Washington* v. *Schriver*, 255 F.3d 45, 56 (2d Cir. 2001) (citation omitted).

This Court may shed light on when the erroneous exclusion of defense evidence rises to the level of a con-

stitutional violation in its decision in *Holmes* v. *South Carolina*, No. 04-1327 (argued Feb. 22, 2006). In *Holmes*, the Court is considering the circumstances under which a defendant has a constitutional right to admit defense evidence that a third party has committed the crime with which the defendant is charged. The Court's decision may illuminate when the strength of the government's case is relevant to whether the exclusion of defense evidence of third party guilt is constitutional error, and it may also bear on whether a showing of prejudice is a component of a defendant's claim that the exclusion of evidence violated his constitutional right to present a defense, or, alternatively, whether it is the government's burden to establish the harmlessness of any erroneous exclusion. Compare, *e.g.*, *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872-873 (1982), with *Crane* v. *Kentucky*, 476 U.S. 683, 691 (1986). This case, however, is not an appropriate vehicle for consideration of those issues, and it need not be held for the Court's decision in *Holmes*.[5]

First, the court of appeals' decision is unpublished, and, in other published cases, the Eleventh Circuit has applied the test that petitioner supports—the *Chapman* standard—to the review of claims involving the erroneous exclusion of defense evidence. See Pet. 18-19 (citing *United States* v. *Todd*, 108 F.3d 1329, 1334 (11th Cir. 1997); *United States* v. *Watson*, 669 F.2d 1374, 1383 (11th Cir. 1982)). This Court's intervention is not re-

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[5] In contrast to *Holmes*, the district court's decision to exclude certain defense evidence did not rely on any legal rule specifically addressing third party guilt evidence. Nor did the court exclude the evidence based on any view about the strength of the government's case against petitioner. Instead, it relied on considerations of remoteness and relevance. See pp. 4-5, *supra*.

quired to resolve any intra-circuit disagreement that may exist in the court of appeals.

Second, to the extent that the court of appeals applied what petitioner believes to be the wrong standard, he bears substantial responsibility for that himself. The court of appeals, in its unpublished opinion, cited neither *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), on which petitioner principally relies (Pet. 17-18) in arguing for the *Chapman* standard, nor *Valenzuela-Bernal*, which petitioner seeks to distinguish (Pet. 16). Nevertheless, insofar as the court implicitly relied on *Valenzuela-Bernal*, see Pet. App. 14a (noting that errors were "material" with respect to the possession count), any arguable error in that regard is directly traceable to petitioner. In his opening brief in the court of appeals, petitioner cited *Valenzuela-Bernal* and *Washington* v. *Texas*, *supra*, and asserted that the Due Process Clause and the Compulsory Process Clause guarantee a defendant "the right to present witnesses and evidence that are *material* and favorable to the defense." Pet. C.A. Br. 22 (emphasis added); see *id.* at 42-44 (arguing that evidentiary errors denied petitioner a fair trial); Pet. C.A. Reply Br. 17-18 (same). In contrast, petitioner did not cite or discuss *Van Arsdall* and *Chapman*, on which he now chiefly relies.

Only after the court had ruled did petitioner cite *Chapman* and argue for application of the "harmless beyond a reasonable doubt" standard, raising that claim in his petition for rehearing. It is well established that the courts of appeals are not obligated to address matters raised for the first time on rehearing, where, as here, those matters could have been raised earlier. See, *e.g.*, *United States* v. *Dockery*, 401 F.3d 1261, 1262-1263 (11th Cir.) (applying the court's "well established rule"

that issues raised for the first time in a rehearing petition are deemed abandoned), cert. denied, 126 S. Ct. 142 (2005). Accordingly, review of petitioner's claim that the court of appeals should have relied on *Chapman* is unwarranted. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992) (declining to consider a claim raised for the first time in a petition for discretionary review that was denied without comment by the highest state court).[6]

Third, the exclusion of the evidence in this case is harmless beyond a reasonable doubt under *Chapman*, as the reasoning of the court of appeals itself indicates. As the court of appeals concluded, the conspiracy-to-import count was "not mostly dependent on Perez," as other "undisputed facts" supported that charge. Pet. App. 14a-15a. The container loaded with 1500 pounds of cocaine, for example, was consigned to petitioner's company, and his company's representative in Ecuador hired an individual to load that container and a separate entity to load most of the others, despite the fact that all of the containers were supposed to be filled with tile from the same supplier. *Ibid.*; see *id.* at 6a. At the same time, Bover's testimony about Perez's prior relationship with Vasquez "is not particularly relevant to the facts about the March 1999 container importation," *id.* at 14a n.8, for which petitioner was convicted. Petitioner had no evidence whatsoever that Vasquez had anything to do with that importation. Under the circumstances, any error in excluding the defense evidence was harmless

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[6] For the same reason, this case would not be a suitable vehicle for addressing petitioner's claim of "confusion" among the courts of appeals concerning when the exclusion of defense evidence in violation of the Federal Rules of Evidence triggers the *Chapman* standard. Pet. 18-20.

beyond a reasonable doubt with respect to the conspiracy-to-import conviction.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2006

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[7] Contrary to petitioner's assertion (Pet. 12-13, 20), the fact that two prior juries were unable to reach a verdict does not compel the conclusion that the district court's evidentiary errors were prejudicial. See, *e.g.*, *United States* v. *Newton*, 369 F.3d 659, 680 (2d Cir.) ("A jury may hang for any number of reasons, including the idiosyncratic views of a single juror. Thus, while a prior hung jury may support a finding that an error committed with respect to a very close issue during a retrial is not harmless, it does not compel such a conclusion.") (citations omitted), cert. denied, 543 U.S. 947 (2004).

(3)

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IN THE

Supreme Court of the United States

JUAN MIGUEL GONZALEZ,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

ARGUMENT

At petitioner Juan Miguel Gonzalez's fourth trial, the district court erroneously excluded evidence of third-party culpability that, in the Eleventh Circuit's opinion, was relevant and material to Gonzalez's defense on both counts of conviction: possession with intent to distribute cocaine and conspiracy-to-import cocaine. The excluded defense evidence included business records proving that fugitive drug trafficker Jorge Luis Vasquez had previously imported containers from Ecuador into South Florida in a manner strikingly similar to the container importation charged in this case.

The Eleventh Circuit, however, held that the error was harmless as to the conspiracy-to import count. The court of appeals reached this conclusion after applying the "non-constitutional" harmless error test of *Kotteakos v. United States*, 328 U.S. 750 (1946), rather than the harmless beyond a reasonable doubt test of *Chapman v. California*, 386 U.S. 18 (1967).

The petition should be granted on the second question presented because the courts of appeals are in demonstrable conflict and confusion over whether and when the exclusion of relevant defense evidence is a constitutional violation. Pet. 13-20. At the very least, the Court should hold the petition in abeyance pending the decision this Term in *Holmes v. South Carolina*, No. 04-1327 (argued Feb. 22, 2006). In *Holmes*, this Court is currently considering the circumstances under which the exclusion of evidence of third party culpability amounts to a constitutional violation (which triggers application of the *Chapman* standard). The government acknowledges that this Court's decision in *Holmes* may "shed light on when the erroneous exclusion of defense evidence rises to the level of a constitutional violation . . ." Opp. 13-14. Nonetheless, the government argues that this Court should neither grant the petition nor wait until it decides *Holmes*. Opp. 14.

First, the government argues that this Court's intervention is not needed to resolve an intra-circuit disagreement that may exist in the Eleventh Circuit. Opp. 14-15. The government reasons that the decision below is unpublished and that, in other published cases, the Eleventh Circuit has applied the *Chapman* standard to review claims involving the erroneous exclusion of defense evidence. Opp. 14. If an intra-circuit split is all that existed, the government's argument might be more attractive. However, as argued in the petition, the confusion and lack of clarity exist within and among virtually all of the circuits. Pet. 16-20. Moreover, the government's

argument does not justify the denial of the petition in advance of the decision in *Holmes*.

Second, the government contends that Gonzalez "bears substantial responsibility" for the Eleventh Circuit's application of the *Kotteakos* standard rather than the *Chapman* standard because Gonzalez did not cite *Chapman* in his initial brief on direct appeal. Opp. 15. By this argument, the government unwittingly demonstrates why the petition should be granted on the first question presented. Namely, the government makes the same mistake as the Eleventh Circuit (and other courts) by suggesting that a defendant bears the burden of persuasion to show prejudice from a preserved trial error. Gonzalez did not advocate the application of ***either*** the *Kotteakos* or the *Chapman* "harmless error" standard in his initial brief because it was not his burden. Nonetheless, Gonzalez ***did*** argue in his initial brief that the improper exclusion of defense evidence amounted to a constitutional violation. Pet. C.A. Br. 22-24. Gonzalez also cited *United States v. Todd*, 108 F.3d 1329, 1334 (11th Cir. 1997), in which the Eleventh Circuit applied the *Chapman* standard to the erroneous exclusion of defense evidence. Pet. C.A. Br. 23.

The burden, therefore, was squarely on the government to show that the error was harmless beyond a reasonable doubt. The government, however, did not even argue below that the exclusion of the business records which proved fugitive Vasquez's prior importations from Ecuador was harmless, nor did the government cite either *Kotteakos* or *Chapman*. Resp. C.A. Br. 41-48. Rather, the government argued unsuccessfully that there was no error. *Id.* Nonetheless, the Eleventh Circuit on its own improperly assigned the burden to Gonzalez and incorrectly opted for the *Kotteakos* standard to the exclusion of material defense evidence.

Third, the government now argues that the erroneous exclusion of defense evidence was harmless even under the *Chapman* standard, "as the reasoning of the court of appeals

itself indicates." Opp. 16. No such conclusion can be inferred from the Eleventh Circuit's reasoning. The government's conjecture as to how the Eleventh Circuit ***might have*** decided the case under the *Chapman* "beyond a reasonable doubt" standard is not nearly as persuasive as the fact that two prior juries were deadlocked on the conspiracy-to-import count even in the absence of the excluded evidence. Although the government attempts to minimize the importance of the two prior hung juries, the courts of appeal have traditionally accorded great significance to prior deadlocks in their harmless error analyses. Pet. 13.[1] Given the testimony that fugitive Vasquez had the connections at the local ports to pull merchandise out of arriving containers, and the fact that the kilogram wrappers seized from the container in March 1999 had the same markings as the wrappers seized in relation to the possession count in November 1998 (in which Vasquez was implicated as the supplier), the exclusion of fugitive Vasquez's prior importations from Ecuador cannot be considered harmless beyond a reasonable doubt.

The government attempts to distinguish *Holmes* by observing that *Holmes* involved a "legal rule specifically addressing third party guilt evidence," whereas the district court's decision to exclude certain defense evidence in this case relied on considerations of remoteness and relevance. Opp. 14 n.5. The "legal rule" in *Holmes*, however, was neither a state statute nor a codified rule of evidence. Rather, it was simply a state supreme court *decisional* standard, evolved over time, that was likewise purportedly rooted in principles of relevance. The circumstances under which the erroneous exclusion of third party guilt evidence requires application of the

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[1] While it is true that "[a] jury may hang for any number of reasons, including the idiosyncratic views of a single juror," Opp. 17 n.7 (*quoting United States v. Newton*, 369 F.3d 659, 680 (2d Cir.), *cert. denied*, 543 U.S. 947 (2004), the fact that ***two*** prior juries were deadlocked cannot be so cavalierly discounted.

Chapman standard ought not to depend upon whether the error is occasioned by an unconstitutional state evidentiary standard, or the unconstitutional application of a federal rule of evidence.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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